IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELINOR E. PETERSEN; CAROL E. HECHE; and 51.424 acres of land, more or less, in the City and County of San Francisco, State of California, et al.,

Defendants and Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF CALIFORNIA,

Appellee.

NO. 18667

BRIEF OF APPELLEE, STATE OF CALIFORNIA

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ELINOR E. PETERSEN; CAROL E. HECHE; and 51.424 acres of land, more or less, in the City and County of San Francisco, State of California, et al., Defendants and Appellants, v. UNITED STATES OF AMERICA, Plaintiff, and STATE OF CALIFORNIA, Appellee.	NO. 18667

BRIEF OF APPELLEE, STATE OF CALIFORNIA

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF A FEDERAL COURT

This is an action in eminent domain by the United States of America for property located in the State of California. The complaint in condemnation is filed pursuant to the Acts of Congress approved August 1, 1888 (25 Stats. 357); July 15, 1955 (Public Law 161, 84th Congress), and August 4, 1955 (Public Law 219, 84th Congress). Order for delivery of possession of the property condemned was made by the United States District Court on February 27, 1956.

STATEMENT OF CASE

Appellee, State of California, claims that, prior to the declaration of taking by the United States, the State of California was the owner of the property condemned and as such is entitled to the appropriate compensation for the taking. Appellants have appeared in this action and contend they are the owners of the property and thus are entitled to compensation for the taking.

The property, at the time of the taking, was submerged land lying in a described area situated between the pierhead line of Oakland-Alameda and the boundary line of the City and County of San Francisco. (T p. 3; 6; 10; 17; 20; 23) The position of the land may, therefore, be characterized roughly as lying in the middle of San Francisco Bay. (T p. 26: 30-32; 27:1-7)

California claims title to this land by virtue of sovereignty. Appellants claim title through a Spanish and Mexican grant known as the "Peralta Grant". (T 40:20-28; 43:19-27)

ARGUMENT

I

THE PERALTA GRANT IS A CONFIRMED GRANT, BUT AS CONFIRMED DOES NOT INCLUDE THE LANDS IN QUESTION

Prior to September 9, 1850, the subject lands were submerged lands covered by the waters of the Bay of San Francisco. On that date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and by reason of that fact acquired title to all tide and submerged lands located within the State of California, not validly conveyed prior to the admission of California. Land in the Bay rejected to a private claimant of a Mexican title, automatically vested title in the sovereign, the State of California.

U.S. v. Mission Rock Co., 189 US 391, 400-401 (and cases therein cited); (47 L.ed 865; 23 Sup.Ct. 606) (1902));

U.S. v. Pacheco, 69 US 587, 590 (2 Wall.) 17 L.ed 865 (1864));

Donnelly v. U.S., 228 US 243, 262; (57 L.ed 820; 33 Sup.Ct. 449 (1913));

U.S. v. Calif., 332 US 19 (91 L.ed 1414; 36 Sup.Ct. 1658) (1947));

Borax Consolidated, Ltd. v. Los Angeles, 296 US 10; (80 L.ed 9 56 Sup.Ct. 23) (1935)).

Under the Treaty of Guadalupe Hidalgo (9 Stats. 922) and particularly by reason of the rejection by the Congress of the originally proposed Article X thereof, Congress did not elect to

automatically recognize Mexican or Spanish land titles in the territory of the treaty. In lieu thereof the United States agreed to recognize titles it confirmed and it set up confirmation machinery by an Act of Congress dated March 3, 1851 entitled "An Act to ascertain and settle the private land claims in the State of California". (9 Stats. 631) Under the statute of confirmation, a private land owner, who elected to perfect title to lands in California, might enjoy those lands provided he complied with the terms of the statute. The statute required all claims to the land be presented within two years from the date of the Act, and in the event the Commission found the claim under Mexican law valid, the United States would confirm title by issuance of patent.

Land titles so recognized vested in the private claimant; land titles rejected reverted to the public domain.

Watriss v. Reed, 99 Cal. 134; (33 Pac. 775) (1893));

McGary v. Hastings, 39 Cal. 360; (13 Pac. 360) (1870));

Bascomb v. Davis, 56 Cal. 152; (19 Pac. 152) (1880)).

It is the patent of the United States that affords title to land in California; not the Spanish or Mexican grants.

Botiller v. Dominguez, 130 US 238; (32 L.ed 926; 9 Sup. Ct. 525 (1888).

In that case the court states:

> " . . . But we are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of

1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States." (p. 255, 256)

Appellants' predecessor in title recognized the procedure and machinery for perfection of his Spanish and Mexican grants. Peralta and his sons made a timely appearance before the Commissioners and set up claim to title in actions Nos. 98, 99 and 100 in the District Court. Appellants concede their claim to title flows from Antonio Maria Peralta. (Apps' Br. p. 8) The patent, which appellants contend establishes their claim of title, is recorded in Book A of Patents, page 648 et seq. in the Alameda County Recorder's office of the State of California.[1/] Appellants agree this is the patent from which their claim flows. (Apps' Br. p. 19) The patent itself conclusively establishes, as a matter of law, the invalidity of appellants' claim of title to the lands which are the subject of the condemnation. Transcript volume 3, pages 9 to 10 recite the actual field notes describing the land in the patent. (Ex. F, p. 669) The description of the patented land is a description of the mean high tide line in the Bay as it existed when California was admitted into the Union. Commencing on the bottom of Exhibit F page 664 it reads: " . . . Thence meandering along the shore of the Bay of San Antonio at the line of

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1. This patent is designated as part of the record on appeal and is Exhibit F before this court. References will be made to this Exhibit and the page numbers which are generally in upper right hand corner of the Exhibit.

ordinary high water . . ." On page 666 the patent goes on " . . . thence meandering along the Bay of San Francisco at the line of ordinary high tide . . . ." The points and stations and the description contained in this patent, in so far as this boundary is concerned, run along the line of mean high tide. The lands which are the subject of this condemnation, lie some two miles bayward of the original shore line.

This court will take judicial notice of geographical positions.

The Apollon, 22 US 362; (6 L.ed 111) (1824);

McNitt v. Turner, 83 US 352;(21 L.ed 341) (1872));

Greeson v. Imperial Irrigation District, 59 Fed.2d 529; affirming 55 Fed.2d 321 (1932);

Law v. Smith, 288 Fed. 7 (1923).

Judge Zirpoli, in his Order Dismissing Claims of Elinor E. Petersen and Carol E. Heche, has clearly and concisely delineated the facts before him and the conclusions of law applicable thereto. We have taken the liberty of incorporating this order as an Appendix. The Order specifically finds the lands in question lie beyond the ordinary high water mark. Thus it is conclusive appellants have no valid claim of title to the lands in question. The entire problem involved in this appeal is just that simple.

APPELLANTS' CLAIM, EVEN UNDER THEIR THEORY, IS NOT VALID

Appellants recognize themselves in privity with Antonio Maria Peralta and his patent to the extent that they trace their chain of title to him but decline to recognize themselves in privity where the Peralta claims were resolved against them. The District Court in action No. 100 commenced the confirmation of the Peralta title in 1852. It concluded that litigation approximately twenty years later in 1874. This was in fact a trial de novo of the proceedings of the Board of Land Commissioners. (U.S.v. Billings, 69 US 444 (2Wall.)(17 L.ed 848) One of the points in the federal court litigation was the determination of the bayward boundary of the Peralta Grant. The court determined that boundary in that action and companion actions 98 and 99. The Supreme Court heard a portion of the claim in 1856. In U.S.v. Peralta, 60 US 343 (19 How.) (15 L.ed 678) (1856)) the Supreme Court affirmed the decree of the Circuit Court, which found the original conveyances valid to establish a claim of title and it also determined the northern boundary of the Peralta Grant. The only language in the decision on the bayward boundary is the recitation of the decree of the District Court that the boundary was " . . . the said bay of San Francisco, from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of said

tract, which line along the bay constitutes its western boundary . . . ." (p.344)

The patent itself recites the many steps taken prior to its issuance. It shows Antonio Maria Peralta came before the court in 1852 for the purpose of having the Commissioners confirm title to his claim founded on a Spanish Grant to Louis Peralta by Don Pablo Vicente de Sola, Military Governor of California. In 1857 United States District Judge Hoffman entered a decree establishing the Bay as the western boundary of the grant. After reciting a number of the other proceedings which took place to establish the boundaries of the claim, the patent finally recites that on September 21, 1865 the court entered its final decree which excluded from the survey " . . . the lands which are conveyed (covered) by those tides which happen between the full and change of the Moon twice in twenty-four hours and that said Survey be in all other respects approved. And it is further Ordered that the Surveyor General of the United States for the State of California caused said Survey to be modified as herein directed so soon as practicable and return into this Court a plat of the same for its approval . . . ." The decree and the patent itself then go on to confirm the description found in the field notes, leaving no doubt of the bayward boundary. (Ex.F)

The determination of the bayward boundary at mean high tide was in keeping with the procedure ordinarily followed in confirming Mexican grants. In Los Angeles v. San Pedro,

182 Cal. 652; (189 Pac. 449; 254 US 636; 65 L.ed. 480; 41 Sup.Ct. 9) (1920)), the court in discussing the rules of interpretation with respect to confirmed patents, said:

> "The first is that a patent should ordinarily be constued as excluding therefrom land below the high-tide line. The rule is thus stated in Wright v. Seymour, 69 Cal. 122, 126 (10 Pac. 323): 'The lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty, and in the absence of an express showing to the contrary it will not be presumed that the government of the United States intended to convey it . . . We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government. Had the government found the claimant entitled to the bed and banks of a tide-water stream, we must suppose it would have used in the patent apt words for its conveyance. Not having done so, the presumption is, that it was not intended to convey the bed of the stream.' It is equally well settled that a grant from the sovereign of land bounded by the sea or by any navigable tide water does not pass any title below high-water mark unless either the language of the grant or long usage under it clearly indicates that such was the intention." (p. 654)

See also: California Civil Code section 830;

Anderson v. Trotter, 213 Cal. 414, 420; (2 Pac. 2373 (1931))

Whether the United States correctly or incorrectly determined the boundary of the original grant in its issuance of the patent can have no effect on the outcome of this litigation or any other litigation involving appellants. Clearly appellants are limited to a claim of title under the patent.

We mention, only as a matter of academic interest,

the District Court in action No. 100 was correct in its confirmation of the land title to the line of mean high tide and not to the "deepest part of the sea"; that unknown place to which appellants claim title. (See: Steward v. United States, 316 US 354, 359-360; (86 L.ed 1529; 62 Sup. Ct. 1154) (1942))

Mexican Grants commonly described boundaries in such fashion but, unlike English law, a Spanish grant couched in such language delivered only an inchoate title. The procedure by which perfect title was vested is ably described by Chief Justice Field in the case of Leese v. Clark, 18 Cal. 535 (1861). At page 574 the court says:

> "When the grant to Leese and Vallejo passed from the Governor and was received by them, there still remained another proceeding to be taken for the investiture of a complete title. The proceeding was a judicial delivery of the possession. Under the Mexican system this proceeding was an essential ceremony where there was any uncertainty as to the precise bounds of the land granted. That there was such uncertainty in the bounds of the tract, as described in the grant in question, is manifest. The location of the line running from the desembarcadero, or landing place, to the playita, or little beach, is one source of uncertainty. That line might be run in several different directions, materially varying from each other, and yet run in each instance in a northerly course from the starting point. There are other sources of equal uncertainty. A delivery of judicial possession was therefore necessary. This proceeding involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement - in other words, a location of the land. The power of locating the land, as preliminary to its formal delivery, belonged to the Government, and could not be exercised by the grantees, at least so as to bind the Government. They took with full knowledge of the right and

power of the former Government in this respect, and in strict subordination to them. It does not appear from the record whether that Government ever acted in the matter. Assuming that it did not, the right and power passed to the United States, and could be exercised by them in such manner and at such time as they might deem expedient. The defendants, as junior grantees, took their grants with this knowledge: - that if the military occupation of the country ceased, and the displaced Mexican authorities were restored, they would only take, if in that event they were allowed to take at all, in subordination to the action of those authorities in the location of the elder grant; and that if the United States permanently retained possession of the country, they would take in subordination to like action of the new Government. By the Act of March 3d, 1851, the new Government designated the manner and conditions under which the right and power of location would be exercised, and declared the effect which should be given to the proceedings had. The defendants, taking whatever interest they may possess in subordination to the future action of the Government, old or new, in determining the location of the elder grant, are in no position to question those proceedings. As the Government acted in this matter only through its appointed tribunals and officers, if it shall discover that imposition and fraud have been practiced upon them, and have produced a result which otherwise would not have been obtained, it may itself institute proceedings to vacate the confirmation and patent, and annul or correct the location. But unless the Government interferes in the matter, the defendants, as junior grantees, are remediless. Their title to the premises was not such at the date of the treaty as to enable them to resist the action of the Government in the location of the elder grant . . . ." (Underlining by the court)

See also: Carpentier v. Montgomery, 80 US 480 (13 Wall.); (2 L.ed. 698) (1872)

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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of the State of California

MIRIAM E. WOLFF
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Deputy Attorney General

CERTIFICATE OF ATTORNEY RESPONSIBLE FOR THE PREPARATION OF THIS BRIEF

I certify that I am one of the attorneys responsible for the preparation of this brief; that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

MIRIAM E. WOLFF
Miriam E. Wolff
Deputy Attorney General

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 51.424 ACRES OF LAND, MORE OR LESS, IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, et al., Defendants.	NO. 35276

ORDER DISMISSING CLAIMS OF ELINOR E. PETERSEN AND CAROL E. HECHE

This is a condemnation of lands proceeding instituted by the United States of America affecting 51.424 acres of land situate under the water of the Bay of San Francisco, just off the Alameda coast. The only claimants to the land are the State of California and Elinor E. Petersen and Carol E. Heche.

The Court now has before it for consideration and determination the motion of Elinor E. Petersen and Carol E. Heche for judgment in their favor, establishing Elinor E. Petersen and Carol E. Heche to be the present lawful owners of said land.

Elinor E. Petersen and Carol E. Heche, hereinafter referred to as claimants, claim title to the land involved

in this litigation through a chain of title dating back to 1820, when the Spanish government granted the Rancho San Antonio to Don Luis Peralta. The sons of Don Luis Peralta succeeded to their father's interest. In 1851, Antonio Peralta, one of the sons, conveyed all of his interest in the Encinal, now the Island of Alameda, to William W. Chipman and Gideon Aughenbaugh by deed dated October 22, 1851. Claimants trace their title to these grantees.

In describing the boundaries in the original 1820 grant, the land was described as bounded on the southwest by the sea.

The claim to Rancho San Antonio was presented to the Commissioners in 1852, pursuant to the March 3, 1851 Act to Ascertain and Settle the Private Land Claims in the State of California by Antonio Peralta. It appears Don Luis Peralta had a perfect title to this property prior to presentation of the claim. The District Court for the Northern District of California confirmed title in 1857 to Rancho San Antonio to the fullest extent of its bounds. The confirmation decree described the western boundary as a line along the bay. The Court further approved a partition agreement between the Peralta brothers. The Encinal was partitioned to Antonio Peralta.

The Court then proceeded to locate the lands by directing an official survey in accordance with the 1851 Act. In 1863, the survey was returned, and objections to the survey

were made by certain persons to the including in the survey tide lands lying within the corporate limits of the City of Oakland. The Court sustained the objection and directed the surveyor to cause said survey to be corrected and exclude from the survey and "from the lands confirmed the waters of the Bay of San Francisco and of the Arms thereof and the lands covered thereby as far as the tides flow at the full and change of the moon."

In 1865, the Court in the same cause vacated its 1863 decree and ordered that "the survey of that part of the Rancho San Antonio confirmed to the said Antonio Peralta the field notes of which were approved by E. F. Beale United States Surveyor General on the 28th day of February 1863 be modified so as to exclude therefrom only the lands which are conveyed (?) by those tides which happen between the full and change of the moon twice in twenty four hours and that said Survey be in all other respects approved."

In 1874, the United States Government issued its patent to Antonio Peralta. The patent contains a complete description of the Rancho San Antonio, together with the decrees of Court and the official survey, the survey having been approved by the Court October 4, 1871.

Claimants' position is that the Spanish grant to Don Luis Peralta places the western boundary as the sea, and that under Spanish law they take to the deepest part of the sea. To sustain their position, the Court would have to conclude that

since Peralta had a perfect title under the Spanish grant, it was not necessary to receive a confirmation of title under the 1851 Act, and that for this reason, they can look to the boundaries established by the Peralta grant. However, this is not the law, for absence of a confirmation of title under the Act of 1851 vests title in the sovereign. To sustain claimants' position, the Court would have to further conclude that while claimants may be bound by the decree of confirmation rendered in 1857, they are not bound by the survey contained in the patent, and that they can go behind the patent to establish their claim. Again, this is not the law. See Chipley v. Farris, 45 C 527 (1873).

In construing the federal act requiring confirmation of land titles, it was first believed by the California courts that it applied only to inchoate, imperfect titles, and that persons whose titles were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the Board of Land Commissioners. Minturn v. Brower, 24 C 644 (1864). The Supreme Court of the United States, however, determined the question by saying that there was no distinction between claims derived from Spain or Mexico that were perfect under the laws of those governments and those that were incipient, imperfect, or inchoate, and that, therefore, no title to land in California depending on Spanish or Mexican grants could be of any validity unless it was submitted to and confirmed by the Board. Botiler v. Dominquez,

130 U.S. 238 (1888). Thus, in order to perfect title in claimants' predecessors, it was necessary that someone in privity with them receive confirmation of the land title under the Act. This was done by Antonio Peralta.

In Chipley v. Farris, supra, a case falling under the 1851 Act, it was contended by the plaintiff that the survey, which was incorporated in the patent, did not accord with the decree of confirmation, and that they were entitled to rely upon the decree, which was also incorporated in the patent, for title to lands within the decree, but not within the survey. The Court held that the patent purports to convey the lands described in the survey and its scope cannot be extended, nor limited, by showing that the decree comprised a greater or less area than the survey. The court points out that a patent issued under the Act of 1851 is the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. While it stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent.

In Wright v. Seymour, 69 C 122 (1886), a claim very similar to the instant claim was made. The question was

whether the land of plaintiff extended to the thread of the stream or bounded by a line at high water mark on the Russian River. The Court, in holding that the land extended only to high water mark, said, in part:

> "The contention of appellant, that his title is derived from the government of Mexico, that the patent from the United States government was simply a confirmation of pre-existing rights under the grant, that at the date of the grant the common law did not exist as a rule of action or decision in California, and consequently, that none of the rights of the patentee conferred by the preceding sovereignty can be divested, is substantially correct.
>
> "But the question remains, what were those rights?
>
> "When we answer this question, in the light of the evidence presented by appellant through the patent of his grantor, we are constrained to say that he has failed to show any right to the land in question . . . .
>
> "We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government.
>
> "Had the government found the claimant entitled to the bed and banks of a tide-water stream, we must suppose it would have used apt words for its conveyance. Not having done so, the presumption is, that it was not intended to convey the bed of the stream."

The Court, in the Wright case, also confirmed the rule that lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty, and in

the absence of an express showing to the contrary, it will not be presumed that the government of the United States intended to convey it. See also United States v. Stewart (1941) 121 F. 2d, 705, 710 (9Cir.).

All claimants rely upon the patent issued to Antonio Peralta. The Court concludes that the patent issued to Antonio Peralta is the only evidence of the extent of the grant and claimants are bound by the patent and the survey contained therein. The patent clearly draws the line at ordinary high water mark, and it will not be presumed that the government intended to convey beyond the ordinary high water mark.

The land in question lies beyond the ordinary high water mark, and hence, title thereto did not pass to Antonio Peralta, his sons or their successors in interest and became vested in the State of California.

The claims of Elinor E. Petersen and Carol E. Heche are therefore invalid and are hence dismissed. Present judgment accordingly. The case is remanded to the Calendar Judge for setting for trial.

Dated: December 18, 1962.

ALFONSO J. ZIRPOLI
United States District Judge